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No. 99-2047

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND ex rel. PAUL J. TAVARES, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

AMICUS BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA, COLORADO IN SUPPORT OF THE RESPONDENTS STATE OF RHODE ISLAND, ET AL.

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AMICUS BRIEF IN SUPPORT OF THE RESPONDENTS, STATE OF RHODE ISLAND, ET AL.

The Board of Commissioners of the County of La Plata County, Colorado (the "Board"), respectfully submits this brief *amicus curiae* in support of respondent State of Rhode Island, et al.[1]

STATEMENT OF INTEREST

The Board has an interest in this case because the Board is a party to a regulatory takings case now pending before the Colorado Supreme Court involving facts similar to this case and raising a legal issue essentially identical to one issue on which the Court has granted certiorari. *See Animas Valley Sand and Gravel v. Board of County Commissioners of the County of La Plata*, 8 P.3d 522 (Colo. App. 2000), certiorari granted by the Colorado Supreme Court August 21, 2000, No. SC 151.

The case before the Colorado court involves a takings challenge under the Colorado Constitution by the owner of a sand and gravel excavation business to La Plata County's river corridor protection regulation. The regulation does not affect the owner's right to continue its established sand and gravel operation on approximately 10 acres of property not included within the designated corridor. The regulation also authorizes various other

[1] This brief was not authored in whole or in part by counsel for a party, and no person, other than amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. *See* Rule 37. A letter from the parties consenting to filing of amicus briefs is on file with the Court.

land uses (not including sand and gravel excavation) on the remaining 33 acres of the property included within the corridor, as of right or subject to compliance with a special permitting process. The owner has not sought permission to pursue any other type of development on this portion of the property.

At trial the Colorado District Court rejected the owner's taking claim. On appeal, the Colorado Court of Appeals reversed on one issue but upheld the trial court's basic conclusion that the regulation did not effect a taking because it did not deprive the owner of all "reasonable use" of the property. The Court of Appeals rejected the contention that, even if the owner has "some reasonable or economically viable use," a taking occurs under the Colorado Constitution if the regulation "goes too far" and "substantially diminishes the value of the property." *Id.* at 525-527.

The Colorado Supreme Court granted certiorari to consider, among other issues, the following question: "Whether a compensable regulatory taking can occur under Colo. Const. Art. II, Section 15, when the complained of regulation 'goes too far' and substantially diminishes the value of the property, even in circumstances where the property retains some economically viable use?"[2] This issue is obviously closely related to the question in this case concerning the magnitude of the economic burden necessary to establish a taking and, more specifically, the argument by petitioner and several

[2] Article II, Section 15 of the Colorado Constitution provides, in part, that: "Private Property shall not be taken or damaged for public or private use, without just compensation."

of his amici that he should be able to recover under a separate "partial" taking test even if the regulation allows reasonable economic use of the property. Because the Colorado Supreme Court follows closely this Court's interpretation of the federal Takings Clause in interpreting the parallel provision of the Colorado Constitution, and because in any event the Board's actions are directly subject to the federal Takings Clause, the Board has a significant interest in the outcome of this case.

As it did in the Colorado Supreme Court, amicus submits here that a compensable regulatory taking can occur only if a regulation denies all reasonable use of the owner's property. The petitioners in both the Colorado case and in this case argue that, even when a regulation does not eliminate all reasonable use, an owner can invoke a separate and independent "partial" takings test. This ostensible test, according to petitioners, would essentially involve a legislative-type analysis and balancing of the costs and benefits of the regulation. Amicus submits that no such independent "partial" takings test actually exists and that strong constitutional and legal policy considerations argue against the creation of such a test.

ARGUMENT

I. The Single Basic Test for a Regulatory Taking Is Whether the Regulation Eliminates All Reasonable Use of the Property.

A. The Court's Decisions Have Consistently Required a Showing That All Economic Use Has Been Eliminated.

The Court has repeatedly stated that a successful regulatory taking claimant must demonstrate that the regulation essentially destroys the property's economic value. Beginning with *Pennsylvania Coal Co. v. Mahon, et al.*, 260 U.S. 393 (1922), the Supreme Court has defined regulatory takings doctrine narrowly, equating a regulatory taking with a complete appropriation of the property. The basic issue in a regulatory taking case, the Court said, is whether the regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court said that, at least when a taking challenge focuses on the economic burden imposed by a restriction,[3] the

[3] The *Agins* Court also said, in the alternative, that a regulation may effect a taking if it "does not substantially advance legitimate state interests." 447 U.S. at 260. Today, it is debatable whether this type of means-ends claim can properly be grounded in the Taking Clause as opposed to the Due Process Clause. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 732 n. 2 (1999) (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 753 n. 12 (Souter, J., concurring in part and dissenting in part). There is no suggestion in this case, or in the case before the Colorado Supreme Court, that the government is not properly acting to advance a legitimate public interest.

single basic issue is whether the regulation "denies an owner economically viable use" of the property. 447 U.S. at 260. Likewise, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court rejected a taking claim, stating that the test for a taking based on economic impact is whether the regulation "denies an owner economically viable use of his land." 480 U.S. at 485 (quoting *Agins*, 447 U.S. at 260).

More recently, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court affirmed a finding of a taking based on jury instructions that read in part as follows:

> For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, *it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.*

526 U.S. at 700 (emphasis added). While the parties did not specifically dispute the propriety of this instruction, the Court stated that "the trial court's instructions are consistent with our previous general discussions of regulatory takings liability." *Id.* at 704.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court addressed the issue whether the city effected a taking by attaching to a land use permit a condition requiring the owner to grant the public access to her

property. In the course of the opinion, the Court observed that if the city had simply prohibited further development on the greenway, no taking would have resulted, given that the owner could continue to operate her plumbing supply store on the other portion of the property. The basic test for a taking based on economic impact, the Court reiterated, is whether the regulation "den[ies] an owner economically viable use of his land." *Id.* at 384 (citing *Agins*, 447 U.S. at 260). Applying that standard, the Court said: "There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property." 512 U.S. at 385 n. 6 (emphasis added).

In line with these precedents, the overwhelming majority of lower federal and state courts analyze regulatory takings claims by considering whether the regulation eliminates essentially all of the property's economic use or value. *See, e.g., Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 286 (4th Cir. 1998) (rejecting takings challenge when regulation caused "only" a 50 percent diminution in value, because "a regulatory deprivation that causes land to have 'less value' does not necessarily make it valueless"); *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992) (overturning a finding of a taking where rezoning permitted construction of only one residence on 40 acres, observing that "the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of the property"), *cert. denied*, 514 U.S. 1064 (1995); *Jafay v. Board of County Commissioners*, 848 P.2d 892, 901 (Colo. 1993) ("[T]he central issue to a takings inquiry is whether the governmental regulation as applied to the aggrieved landowner's property forecloses all use of the property."); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531 (Wis. 1996) ("[T]he rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required.").[4]

B. Neither *Lucas* Nor *Penn Central* Establish a Partial Takings Test.

The so-called "partial taking" theory rests on a strained and unpersuasive interpretation of two U.S. Supreme Court decisions, *Lucas v. South Carolina Coastal*

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[4] The principal dissenter from this general view has been the U.S. Court of Appeals for the Federal Circuit, which has adopted an expansive "partial" regulatory taking rule. *See Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *but see Id.* at 1573 (Nies, C.J., dissenting). Setting aside the legal merits of the Federal Circuit's approach, it is noteworthy that the Federal Circuit only hears takings claims against the United States. Takings claims against the federal government are generally paid out of the Judgment Fund, a permanent and unlimited appropriation designed to cover financial obligations incurred by the United States. *See* 31 U.S.C. 1304. States, much less counties and other local governments, obviously lack the same unlimited financial resources. The Board respectfully submits that the Takings Clause should be interpreted in a fashion that takes into account the practical challenges facing all levels of government throughout this country.

Council, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). According to this theory, *Lucas* established a two-tier regulatory takings test, with the first type of taking involving a "total" elimination of property value, and the second type involving a "partial" reduction in property value. In addition, according to this theory, the *Penn Central* decision supplies the standards for evaluating a "partial" taking claim; these ostensible standards include the economic impact of the regulation, the owner's investment-backed expectations, and the "character" of the government regulation. These three factors are supposed to be weighed in an ad hoc balancing test.

First and foremost, *Lucas* did not in fact establish a two-tier regulatory takings test. *Lucas* involved a prohibition on coastal development that, according to the undisputed findings of the trial court, made the property "valueless." 505 U.S. at 1009. The Court, by a margin of 6 to 3, with Justice Kennedy concurring, concluded that the South Carolina Supreme Court erred in rejecting the takings claim. In dissent, Justice Stevens, criticized the majority's ruling as "wholly arbitrary" on the ground that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Lucas*, 505 U.S. at 1064. In response, Justice Scalia, speaking for the majority, responded by stating:

> This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation [in *Lucas*],

> but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.

Id. at 1019 n. 8 (quoting *Penn Central*, 438 U.S. at 124). This language does not establish that, if a claimant cannot demonstrate a taking under the traditional denial-of-all-economically-viable-use standard, the claimant is entitled to a separate bite at the apple based on a separate "partial" taking test derived from *Penn Central*.

First, Justice Scalia's reference to a possible separate *Penn Central* test was *dictum*. *Lucas* involved a regulation that rendered property "valueless" and the Court's closely divided ruling ultimately rested on that fact. The discussion of the standard (if any) that might apply in a case in which the property retains some economic value was unnecessary to the resolution of the case. Moreover, in the same footnote, Justice Scalia indicated that cases of 95% uncompensated loss will remain and that "takings law is full of these 'all or nothing' situations." *Lucas*, 505 U.S. at 1019 n. 8.

Second, as discussed above, numerous other decisions of the Court pre-dating and post-dating *Lucas* articulate a single basic test for a taking based on a regulation's adverse economic impact on the owner. These decisions contradict the novel idea of a two-tier takings analysis suggested by the *dictum* in *Lucas*. As discussed, just two years ago in *City of Monterey* the Court recited with approbation instructions directing a jury to find a "deni[al of] all economically viable use" if

"there remains no permissible or beneficial use for [the] property." *City of Monterey*, 526 U.S. at 700. The Court did not state, suggest or hint that recovery might have been possible on an alternative, less demanding "partial" taking theory. Similarly, as also discussed above, *Dolan* dispels the notion of a two-tier taking analysis. *See* 512 U.S. at 385 n. 6.

Third, the "partial" taking theory misapplies *Penn Central* by ignoring the substantial developments in takings doctrine during the 20-plus years since that decision was handed down. The *Penn Central* Court famously observed that defining a regulatory taking "has proved to be a problem of considerable difficulty," and, therefore, the Court had been forced to rely on "essentially ad hoc, factual inquiries" to resolve specific cases. 438 U.S. at 124. Nonetheless, the Court continued, its decisions had identified "several factors that have particular significance" for resolving regulatory takings claims:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. Contrary to petitioner's view, the *Penn Central* Court did not articulate a "partial" regulatory taking test and the decision does not support such a theory.

As a threshold matter, the *Penn Central* Court probably never intended the "ad hoc" factors described in the decision to serve as a free-standing, determinative test for a taking. The three factors mentioned in the decision are obviously relevant in takings analysis, but the Court

provided no indication about how these different factors might be weighted or combined to resolve a particular case. On its face, the Court's analysis could support the conclusion that virtually every newly enacted use restriction effects a taking; it can also be read to mean that such enactments rarely result in takings.

Perhaps because of the fundamental indeterminacy of the three "significant" factors identified in *Penn Central*, the Court has *never* relied on the ostensible *Penn Central* "test" to uphold a regulatory taking claim. The Court has referred to the *Penn Central* analysis frequently enough, but it has treated the analysis as inadequate, by itself, to support an actual finding of a taking. Instead, every Court decision upholding a taking claim over the last several decades has pointed to some special factor, such as the fact that the regulation completely destroyed the value of the property, *see, e.g., Lucas* (total elimination of value of coastal lots) *and Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (total destruction of economic value of trade secret); the regulation resulted in a physical occupation of private property, *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (forced occupation of private property by cable television equipment), *Dolan* (exaction resulting in a physical occupation), *and Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (analogizing appropriation of a specific fund of money to a physical occupation); or the regulation abrogated a particularly fundamental type of property interest, *e.g.*, the right to pass on property by inheritance, *see e.g., Hodel v. Irving*, 481 U.S. 704 (1987).

Whatever the Court's original intent in articulating the *Penn Central* 3-factor analysis, the Court, building

upon the foundation provided by that opinion, has subsequently articulated a series of definitive, bright-line rules addressing each of the key factors enumerated in *Penn Central*. First, the *Penn Central* Court referred to the "character" of the regulation as one factor in taking analysis. By this term the Court meant:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124. In the subsequent *Loretto* decision, the Court determined that a government-authorized physical invasion of private property automatically results in a taking. *Loretto*, 458 U.S. at 426. Because the physical-invasion "character" of a regulation, by itself, automatically leads to a finding of a taking, the "character" factor has no logical place in any putative multi-factor test.

Second, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), another post-*Penn Central* case, the Court converted the "distinct investment-backed expectations" factor into another bright line rule. The Court ruled that, even when the value of a property interest is entirely eliminated, a taking claim is precluded if the claim is barred by a lack of investment-backed expectations. *Id.* at 1005. Again, because a lack of investment-backed expectations, by itself, precludes a finding of taking, that factor has no coherent role to play in a putative multi-factor test.

Finally, *Lucas* illustrates the circumstance when "economic impact," the third factor mentioned in *Penn Central*, can actually result in a finding of a taking. As discussed above, both before and after *Lucas*, the Court repeatedly stated that a taking can be established when a regulation eliminates essentially all economic use. In *Lucas*, where the property was actually made "valueless," the Court was confronted with a case involving the kind of severe economic loss that met the Court's longstanding economic-impact test. Thus, the holding in *Lucas* simply reaffirms the Court's position that a regulation effects a taking when it "denies an owner economically viable use" of the property. *Agins*, 447 U.S. at 260.

The Court's basic rules for evaluating a regulatory taking claim are now relatively clear. A physical occupation generally results in a taking, no matter how modest the economic impact on the owner. A lack of investment-backed expectations (outside the physical-occupation context) generally precludes a regulatory taking claim, no matter how stringent the regulation. And a newly enacted regulation that eliminates all reasonable economic use will generally result in a taking, subject to several narrow but important exceptions, most notably for rules that parallel the background principles of nuisance and property law. *See Lucas*, 505 U.S. at 1027-28. These individual tests represent an evolutionary refinement of the 3-factor analysis described in *Penn Central* over twenty years ago. With these determinative, bright-line tests in place, there is no separate, ad hoc *Penn Central* analysis to apply.

Advocates of an expansive reading of the Takings Clause seek to defend the notion of an independent *Penn*

Central "partial" takings test by arguing that the ostensible *Penn Central* test entails a distinctive type of analysis relative to that required under *Lucas/Agins*, i.e. denial of economically viable use. The first purported ground for differentiating between these two tests and therefore justifying their separate continued existence is based on how the public purpose of a regulatory action should be analyzed in a takings case. In *Lucas*, the Court made clear that the weight of the public interest being served by a regulation is irrelevant in the taking analysis. 505 U.S. at 1026. On the other hand, according to proponents of the partial takings theory, in a taking case not covered by *Lucas*, the weight of the public interest has to be "balanced" against the burden being imposed on the owner.

However, a balancing of public and private interests cannot play a coherent role in any regulatory takings case. The Court has stated that a valid taking claim *presupposes* that the government is acting for a legitimate public purpose. *See First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 315 (1987). If a viable taking claim presupposes the government is acting for a legitimate public purpose, then the public purpose served by the regulation cannot logically be a factor to be weighed along with other factors in determining whether compensation is due under the Fifth Amendment.

This conclusion is also supported by common sense. The government's liability for a classic taking of property, such as for a school or some other public facility, does not vary with the importance of the public project. Indeed, it would be absurd to suggest that the government could deny its obligation to pay just compensation when it condemns land for a new school on the ground that the school will serve a pressing public need. The Fifth

Amendment has the same basic meaning whether the government initiates a condemnation or an owner brings an inverse condemnation action. *See First English*, 482 U.S. at 315. Accordingly, the value of the public objective being served by a regulatory program cannot have any relevance to the government's possible liability for a taking. Because the public value served by a regulation has no logical place in any takings case, the idea that the purported *Penn Central* analysis can be distinguished from the *Lucas/Agins* test because the former provides for consideration of the weight of the governmental purpose must be rejected as well.

A second possible basis for differentiating between the *Lucas/Agins* takings test and the ostensible *Penn Central* "partial" takings test is to treat the claimant's investment expectations (or the lack thereof) as a relevant factor under *Penn Central* but as an irrelevant consideration under the *Lucas/Agins* test. The flaw in this argument is that a lack of investment expectations should be an appropriate factor for the courts to consider in *any* type of takings case.

The basic rationale for treating a lack of expectations as a relevant factor in takings analysis is straightforward:

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994). This reasoning applies to any sort of

regulatory taking case because awarding compensation to purchasers with notice could always result in unfair windfall payments at taxpayer expenses. Furthermore, treating expectations as irrelevant in a *Lucas/Agins*-type case would have the pernicious effect of encouraging owners to sell off small, wholly restricted pieces of their property to new owners who could (under this theory) sue for a taking even if the only business purpose of the transaction was to maximize recovery under the Takings Clause. In the end, this theory would force government to abandon many essential land use regulations, including restrictions on development on extremely steep slopes, in areas subject to mudslides, and on property containing critical environmental resources. *See also Ruckelshaus v. Monsanto Co., supra* (holding that a lack of investment-backed expectations can preclude a taking claim based on an alleged total taking of an intellectual property right).

In sum, there is no reasonable basis for concluding that a claimant's investment expectations could matter under the ostensible *Penn Central* test but could be disregarded in a *Lucas/Agins* case. Thus, this attempt to rationalize a two-tier taking analysis fails as well.

II. The Requirement that a Regulation Eliminate All Reasonable Use is Supported By Sound Constitutional and Legal Policy Considerations.

The Court's traditional view that a regulatory taking requires the elimination of the property's economic use is supported by (1) the language and original understanding of the Takings Clause; (2) federalism values; (3) the need for the judicial branch to defer to the people's

elected representatives on matters of social policy; (4) the pervasiveness of governmental "givings" and the "reciprocal" benefits of regulations; and (5) the need for the clear and predictable legal rules.

A. The Original Understanding of the Takings Clause Supports Use of the Single Basic Takings Test

First, the traditional reading of the Takings Clause is supported by the historical evidence concerning the original understanding of this constitutional provision.

As stated in *Lucas*: "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." 505 U.S. at 1028 n. 15. This conclusion is supported by numerous scholarly investigations including, for example, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000) and William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995). As these investigations explain, there is little direct evidence of the drafters' intentions in including the Takings Clause in the Bill of Rights. The provision was drafted by James Madison and included in the Bill of Rights at his instigation with no recorded debate. As a result, interpreters of the Takings Clause have been forced to resort to examining historical antecedents in colonial charters, the Northwest Ordinance and various state constitutions, as well as studying contemporary views about the scope of government authority to regulate the use of land and other property. The basic conclusion of this exhaustive research

has been that "the Takings Clause was originally intended and understood to refer only to the appropriation of property." Hart, 94 Nw. U. L. Rev. at 1103.

Existing Court precedent forecloses, at least for the present, a strict adherence to the original understanding of the Takings Clause. *See Pennsylvania Coal Co. v. Mahon, et al.*, 260 U.S. 393 (1922). In weighing petitioner's argument for a further expansion of regulatory takings doctrine, however, the original understanding is surely relevant. It is one thing to recognize that a regulation can effect a taking if it "has very nearly the same effect for constitutional purposes as appropriating or destroying it," *id.* at 414; it would be quite another to conclude that a regulation that leaves an owner reasonable economic use of the property can also effect a taking. The regulatory takings doctrine has a questionable constitutional foundation. Petitioner's proposed expansion of the doctrine would rob it of constitutional legitimacy altogether.

B. Federalism Values Support Use of the Single Basic Takings Test.

A second reason for rejecting petitioner's expansive regulatory takings theory is that it would conflict with federalism, one of the most important values enshrined in the Constitution. As the Court stated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Id.* at 457, quoting *Texas v. White*, 74 U.S. 700, 725 (1869).

Federalism promotes numerous values that are central to a free and pluralistic society. Among other things, "[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458. *See also New State Ice Co v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing the states as the "laborator[ies]" of democracy).

The principle of federalism has long been central to the interpretation of the Takings Clause. The Court has recognized that "[p]roperty interests . . . are not created by the Constitution. Instead, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984).

An expansive theory of regulatory takings, on the other hand, would tend to federalize property issues by imposing a stricter, uniform national standard upon the regulation of property. This, in turn, would undermine federalism itself by constraining the ability of state and local officials to adopt local solutions that respond to local needs and preferences. The broader the reading of the Takings Clause, the tighter the constitutional constraints on states and their subdivisions and the more the "laboratories" of democracy are undermined.

The federalism issue is brought into even sharper relief by the tension between petitioner's attempt to subject the State of Rhode Island to monetary liability under the Takings Clause and the Court's recent decision in *Alden v. Maine*, 527 U.S. 706 (1999), recognizing that the States are generally protected from federal-law suits for money damages based on sovereign immunity.[5] While the Takings Clause, of its own force, creates a federal right of action seeking "just compensation," *see First English Evangelical Lutheran Church v. City of Los Angeles, supra*, it is well established that the United States is immune from liability under the Takings Clause absent a specific waiver of its immunity. *See Lynch v. United States*, 292 U.S. 571, 579, 580-82 (1934). *See also Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act . . . , the courts would be able to order disbursements from the Treasury to pay for property taken under lawful

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[5] Rhode Island did not originally raise a sovereign immunity defense in this case, perhaps in part because the case was briefed and argued in the Rhode Island Supreme Court prior to this Court's ruling in *Alden*. However, under state law, like under federal law, waiver of sovereign immunity protection must be deliberate. *Compare Edelman v. Jordan*, 415 U.S. 651, 673 (1974) *with Mulvaney v. Napolitano*, 671 A.2d 312 (R.I. 1995). The Rhode Island courts in interpreting the Rhode Island Takings Clause, like the federal courts in interpreting the federal Takings Clause, have apparently concluded that this provision, of its own force, creates a right of action for monetary relief. *See Annicelli v. Town of South Kingston*, 463 A.2d 133 (R.I. 1983). However, that determination does not address the separate issue of whether the State has deliberately waived its sovereign immunity.

authority (and subsequently destroyed) without just compensation."). In light of *Alden*, the States must be protected from suit under the Takings Clause based on sovereign immunity to the same extent as the federal government. The essential lesson of *Alden*, of course, is that the States, though more limited in power than the federal government, possess and are entitled to defend sovereign rights equal in importance and dignity to those possessed by the United States. *Cf. City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687, 714 (1999) (specifically recognizing but not definitively resolving the issue of State immunity from suit under the Takings Clause). *See generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 137-39 (1999) (discussing sovereign immunity constraints on recovery for government takings).

C. The Tradition of Judicial Deference to the Democratic Branches Supports Use of the Single Basic Takings Test.

The expansive theory of regulatory takings also should be rejected because it would improperly expand judicial power at the expense of the other branches of government.

Petitioner's broad "partial" taking theory would seriously intrude upon, if not literally destroy the other branches of government. As Justice Oliver Wendell Holmes famously remarked: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change

in the general law." *Mahon*, 260 U.S. at 413. In another case, the Court expanded on this theme:

> [G]overnment regulation – by definition – involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.

Andrus v. Allard, 444 U.S. 51, 64 (1979)[6]

Petitioner's expansive regulatory taking theory also conflicts with the general presumption in favor of the constitutionality of legislative action, which is rooted in the doctrine of separation of powers and the general rule that matters of social policy should be decided by the

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[6] It is sometimes asserted that an expansive reading of the Takings Clause does not intrude upon the legislative sphere because the clause is concerned not with whether the government can proceed with its programs, but instead with whether the government must pay "compensation" as a condition of doing so. This argument is pure sophistry. First, to require the government to pay in order to regulate fundamentally alters the intended character of the governmental action, from a restriction on use to a purchase of property. Second, as a practical matter, government, particularly at state and local levels, could not conceivably pay for every effect specific regulatory actions have on property values; thus a broad "compensation" requirement would have a direct and immediate effect on the permitted scope of legislative action. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J, concurring in the judgment and dissenting in part) (expansive regulatory takings liability could "subject[ ] States and municipalities to the potential of new and unforeseen claims in vast amounts"). *See generally* J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy"*, 51 Ala. L.Rev. 949, 954 (2000).

people's elected representatives. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 524 (1998) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)) ("[L]egislative [a]cts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality."). In a well known commentary on the judiciary's use of constitutional checks on majoritarian decision-making, then future Supreme Court Justice Robert Jackson wrote:

> [Electoral majorities] should, of course, be so restrained when [their] program violates clear and explicit terms of the Constitution, such as the specific prohibitions in the Bill of Rights. But to use vague clauses to import doctrines of restraint, such as "freedom of contract," is to set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed.

Robert H. Jackson, *The Struggle for Judicial Supremacy* 319 (1941). More recently, Justice Scalia described the dangers of what he termed an "Imperial Judiciary" making constitutional decisions relating to abortion based on "philosophical predilections and moral intuitions" about issues properly left to the political process. He concluded:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

An expansive regulatory takings doctrine risks the same kind of judicial intrusion into legislative decision-making that characterized the application of Due Process principles during the ill-fated era of *Lochner v. New York*, 198 U.S. 45 (1905). *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (O'Connor, J., plurality opinion) (noting that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation," citing *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), and *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)). The risk would not be reduced by substituting the takings label for the due process label. *Cf. Id.* at 544 (Kennedy, J. concurring in the judgment and dissenting in part) ("If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events.")[7]

In sum, petitioner's expansive theory would require this Court to routinely second-guess the fairness of legislation enacted by state and local governments and cannot be squared with the traditional function of the judicial branch under our system of separation of powers.

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[7] In *Florida Rock Industries*, the Federal Circuit, responding to the criticism that the Circuit's "partial taking" theory was too expansive, stated that, "What is necessary is a classic exercise of judicial balancing of competing values." *Id.* at 1570. Within our constitutional system, the task of balancing competing values belongs to the legislature, not the courts.

D. "Givings" and "Reciprocity of Advantage" Support Use of a Single Basic Takings Test.

The partial regulatory taking theory also must be rejected because it fails to take into account either how regulatory programs confer a "reciprocity of advantage" upon property owners or governmental "givings". Consideration of these factors demonstrates that the partial regulatory taking theory is unnecessary to correct any systematic unfairness to landowners and that adoption of the partial taking theory would result in unfair windfalls to landowners at taxpayer expense.

The term "reciprocity of advantage," coined by Justice Holmes, refers to the benefits property owners receive from regulatory programs, both in their status as regulated owners and as members of society as a whole. As the Supreme Court stated in *Agins*, property owners "share with other owners the benefits and burdens of the city's exercise of its police power." In assessing the "fairness" of exercises of the police power, "these benefits must be considered along with any diminution in market value that the [owners] might suffer." 447 U.S. at 262; *see also Andrus v. Allard*, 444 U.S. at 67 (taking claim failed because the restriction was "a burden borne to secure the advantage of living and doing business in a civilized community"); *Keystone Bituminous Coal*, 480 U.S. at 491:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

In addition to the phenomenon of reciprocity of advantage, governmental "givings" also should be considered in weighing the ostensible fairness arguments on behalf of the partial regulatory taking theory. Public funding of construction of schools, roads, sewers, and other public facilities contribute significantly to the value of land. While all taxpayers contribute to these givings, particular landowners often receive disproportionate benefits from these public investments.

Given regulation's reciprocal effects and the pervasiveness of governmental givings, awarding compensation based on partial reductions in value would run a high risk of "compensating" an owner for an injury that, in a fundamental sense, did not occur. Advocates of an expansive view of takings often rest their arguments on notions of fundamental "fairness." However, a comprehensive and accurate picture of how governmental actions actually affect property values rebuts this argument.

E. The Practical Need for Bright Line Legal Tests Supports Use of The Single Basic Takings Test.

Finally, petitioner's "partial" takings theory must be rejected because of the need for the courts to draw clear and predictable lines in order for the rule of law to be able to function at all. The rule that a regulation must eliminate all reasonable use satisfies this need because it identifies a relatively discrete and fairly easily identified set of cases. If the law were otherwise, and if a taking could be established merely by showing that a regulation has gone "too far," or that the owner has suffered a

"substantial" loss, the law of takings would be a highly unpredictable morass, for landowners and government officials alike.

The importance of bright line rules in regulatory takings doctrine is confirmed by the Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, the Court justified the adoption of a "per se" rule for "permanent physical occupations" of private property on the ground that it "avoids otherwise difficult line-drawing problems." 458 U.S. at 436. The Court said that a per se physical-occupation takings rule, even if somewhat over-broad, is justified because it "presents relatively few problems of proof," *id.* at 437, and avoids the need for intensive examination of the facts of each particular case.

In the same fashion, confining regulatory takings doctrine to the total-loss case also avoids difficult line-drawing problems. Even if there were some occasional alleged "partial" takings that seemed to call out for a judicial remedy, the impulse to address these claims has to be considered in light of the advantages, for the regulated and the regulator alike, of a clear and well-defined legal line. Just as the Court's rule for physical occupations is somewhat over-inclusive, the requirement that a regulation eliminate all reasonable economic use might be viewed by some as under-inclusive. But for the rule of law to prevail, the law needs to speak in clear and unmistakable terms. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); *cf. National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe*

Ry. Co., 470 U.S. 451, 477 (1985) (observing that the Constitution does not require that Congress "select the scheme that a court later would find to be the fairest").

Professor Frank Michelman's seminal article, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1196 (1967), contains language which speaks eloquently to the need for takings doctrine to include clear legal rules. In his article, which probably has been cited more frequently by the Court than any other work on this subject, Michelman surveyed at great length the various factors that he thought relevant to analyzing the fairness issues at the heart of a taking case. In the concluding section of his article, Professor Michelman cautioned that a free-wheeling analysis of fairness along the lines he outlined was unlikely to supply a suitable judicial standard. In a passage strikingly relevant to the issue now before this Court, he wrote:

> This is not to say that courts cannot usefully be put to work deciding at least some compensability issues. It is rather to suggest abandonment of any idea that courts can or will decide each compensability case directly in accordance with the precept of fairness. Hence, we need to search instead for some workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate. But if that is our choice (or our preferred description of what actually takes place) it is of the utmost importance that we clearly and frankly acknowledge it. The danger here is one of behaving as if courts were doing the whole job when the truth is that they are attentive only

> to "hard core" or "automatic" cases. To illustrate: a utilitarian approach to the problem might suggest a judicial rule that compensation is due only when there has been either (a) a physical occupation or (b) a nearly total destruction of some previously crystallized value which did not originate under clearly speculative or hazardous conditions. Such a rule would be workable; it would be internally consistent; and it would be ethically inoffensive as far as it goes. True, its cut-off points are arbitrary, and it completely disregards some significant but less discussable dimensions of fairness. But these attributes in the rule would merely reflect its function as a rule for courts to use in the partial performance of a task for which judicial capabilities are not fully adequate.

80 Harv. L. Rev. at 1250-51. Professor Michelman articulates a practical understanding of how the law must translate notions of fairness into a bright-line test and provides powerful support for the Court's traditional test requiring the elimination of all reasonable economic use of the property.

CONCLUSION

For the foregoing reasons, the Board urges the Court to affirm the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

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